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Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

v.

THE STATE OF MISSISSIPPI, *et al.*,
Appellees.

On Appeal from the United States District Court For the Southern District of Mississippi

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BRIEF OF *AMICI CURIAE* THE STATE OF MARYLAND, CONSUMERS UNION OF UNITED STATES, INC., NATIONAL CONSUMER LAW CENTER, INC., NATIONAL WILDLIFE FEDERATION, NATURAL RESOURCES DEFENSE COUNCIL, INC., AND SOLAR LOBBY IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

In addition to the issues that we expect the Solicitor General to discuss, the amici believe that the Question Presented, *see* appellants' Jurisdictional Statement, at i, includes the following issues for decision:

1. Whether the constitutionality of section 210 of the challenged statute, 16 U.S.C. § 824a-3 (Supp. III 1979), is established by the principle of *Testa v. Katt*, 330 U.S. 386 (1947), that Congress may enact a federal rule of decision which may not be ignored in a state tribunal's adjudication of controversies, at least when the tribunal properly would apply an analogous state rule of decision.

2. Whether statutes that are enacted under Congress' power to preserve national security are subject to a less exacting test under the tenth amendment, U.S. Const. amend. X, than are statutes enacted to regulate commerce; and, given Congress' reliance on its national security powers in enacting the statutory provisions here at issue, whether the provisions therefore satisfy the tenth amendment.

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As to amici other than the State of Maryland, this brief in support of appellants is submitted with the written consent of counsel to all parties filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

The State of Maryland is one of the intended beneficiaries of the tenth amendment. In addition, Maryland is itself an energy consumer, and it possesses a strong parens patriae interest in the welfare of its residents and in economic development within its borders. Three of the other amici (National Wildlife Federation, Natural Resources Defense Council, and Solar Lobby) are national

organizations dedicated to protection of the environment, to prudent use and responsible preservation of natural resources, and to the economic, esthetic, and social advantages that flow from decreased dependence on nonrenewable sources of energy. Two amici (Consumers Union and National Consumer Law Center) are national organizations dedicated to consumer protection. These five organizations have over six million members and supporters. A more detailed description of these amici appears in the Appendix to this brief.

Amici have an interest in this case because titles I and III of PURPA have furthered amici's aims of creating more equitable utility rate structures and of preparing for, and so reducing the severity of, the nation's coming crisis in nonrenewable energy supplies. In addition, section 210 of the statute, 16 U.S.C. § 824a-3 (Supp. III 1979), encourages both greater efficiency in the use of nonrenewable, fossil fuels and accelerated development of renewable sources of supply, with accompanying environmental benefits. Because of the effectiveness that the statute's incentives have already demonstrated, amici consider their preservation to be critically important for the nation.

SUMMARY OF ARGUMENT

In enacting the Public Utility Regulatory Policies Act of 1978 ("PURPA"),[1] Congress confronted a steadily worsening national energy situation that threatens the integrity both of America's economy and of its national security. *See* PURPA § 2, 16 U.S.C. § 2601 (Supp. III 1979). Title I, section 210, and title III of PURPA[2] ameliorate this grave situation by providing important incentives for more efficient utilization of nonrenewable energy resources and for development of renewable ones.

[1] Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of 15, 16, 30, 42, 43 U.S.C.).

[2] The court below voided in their entirety title I, section 210 of title II, and title III, which are codified at 16 U.S.C. §§ 2601-2644 (Supp. III 1979), at *id.* § 824a-3, and at 15 *id.* §§ 3201-3211.

By reducing the need for costly new electricity generating facilities, these provisions also hold down electric rates.

Because the challenged provisions do not impair states' ability to structure their integral operations, the provisions comply with the tripartite threshold test set out in *Hodel v. Virginia Surface Mining & Reclamation Association*, 101 S. Ct. 2352, 2366 (1981). First, by reserving to state regulatory authorities the final decision regarding the adoption of federally suggested rate standards, titles I and III avoid displacing any state decisions whatsoever. Second, although section 210 preempts certain state policies regarding public utilities, it effects no impairment of states' ability to structure their operations, since the section requires only that a federal rule of decision be respected in certain state adjudications between private parties. Such preemption of state regulatory policy does not raise tenth amendment concerns. *See Virginia Surface Mining*, 101 S. Ct. at 2367-69.

Indeed, state adjudicatory compliance with federal rules of decision is constitutionally required by the supremacy clause [3] and by *Testa v. Katt*, 330 U.S. 386 (1947). *Testa* holds that Congress may enact rules of decision that a state tribunal may not ignore, at least in situations where the state tribunal would respect, and apply, the rule of decision if the rule were of state rather than federal origin. The Mississippi Public Service Commission ("MPSC") properly would resolve disputes arising under section 210 if section 210 were Mississippi law. When adjudication is conducted by a state administrative tribunal, like the MPSC, the nature of the adjudicatory process invokes the policies underlying the supremacy clause no less than when adjudication is conducted by a traditional state court.

Even if states' ability to structure integral operations were impaired, the challenged provisions are constitutionally justified by the severity and urgency of the national energy problems. The provisions are also established as

[3] U.S. Const. art. VI, para. 2.

constitutional by the less exacting tenth amendment test applicable to statutes that are intended to preserve national security.

ARGUMENT

I. FACTUAL BACKGROUND—THE CHALLENGED PROVISIONS DEAL WITH IMPORTANT ASPECTS OF A GRAVE THREAT TO AMERICA'S WELL-BEING

A. The Nation's Energy Crisis Is Serious And Urgent

Our country's present pattern of energy utilization and our dependence on nonrenewable sources of energy is a recipe for disaster. Present practices are inexorably impelling the nation toward a crisis of supply, and we are not yet adequately either reducing our rate of energy consumption or shifting our reliance from nonrenewable to renewable sources. *See generally Energy Future: Report of the Energy Project at the Harvard Business School* (Ballantine ed. 1980) [hereinafter cited as *Energy Future*].[4]

America's demand for fossil energy, particularly petroleum, is already having a devastating effect on the country's economy. In 1980, the United States spent seventy-nine billion dollars for imported oil.[5] Internationally, our level of imports contributes to the weakness of the dollar and, by inviting international protectionism, may even threaten a worldwide depression. Domestically, petroleum dependence is a major contributor both to inflation, because of high energy prices, and to recession and unemployment, because of the resources withdrawn from

[4] Amici strongly recommend this dispassionate and scholarly report to the Court, and, because it is frequently cited in this brief, have lodged several copies of it with the Clerk of the Court.

[5] U.S. Department of Commerce, Survey of Current Business 50, line 24 (June 1981) ($78,919 million). For comparison, at 1980 prices, seventy-nine billion dollars a year would be enough in only thirteen years to purchase every share of stock listed on the New York Stock Exchange. *See* New York Stock Exchange Research Department, The Stocks Available for Trading on the NYSE, End of June 1980.

the economy to pay for imports. *See Energy Future, supra*, at 1-5, 44-46.

At our current level of dependence, the only thing worse than buying present amounts of imported petroleum would be not being able to buy them. A relatively minor interruption in world supply was sufficient to produce the gasoline crisis of 1979. Given the political, military, and social instability of many of the societies from which we buy petroleum, and given the overt hostility of many of the governments whose exported oil and gas we consume, continued dependence subjects the nation to an intolerable level of vulnerability.[6]

Attempts to replace foreign nonrenewable energy sources with domestic ones cannot be viewed as a total solution to the problem. First, timely substitution simply is not possible. *See, e.g., Energy Future, supra*, at 46-52 (oil); *id.* at 89-92 (natural gas); *id.* at 124-26 (coal); *id.* at 148-66 (nuclear). Second, even if it were feasible to increase the rate of domestic resource depletion in order to replace foreign sources, such action would not be desirable over the long term. America's nonrenewable energy resources are a finite, irreplaceable national heritage. Oil, for instance, is not merely a fuel to be burned; it is the basic raw material for the entire petrochemical industry. Every bit that we use now reduces what we can pass on to future generations. *See generally, e.g.*, National Geographic Society, *Energy: Facing Up to the Problem, Getting Down to Solutions* 16-18 (1981).

The damage, moreover, from increased use of nonrenewable domestic resources is not restricted to the fact of their depletion. Significant environmental harm frequently accompanies the extraction of nonrenewable sources of energy. After their extraction, utilization of

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[6] *See, e.g.*, H.R. Rep. No. 96-165, 96th Cong., 1st Sess. 5 (1979) (to accompany the bill that became the Energy Security Act) (describing warnings by Department of Defense representatives); Alm, *Energy Supply Interruptions & National Security*, 211 Science 1379 (1981).

such sources often entails additional environmental degradation and sometimes damage to public health. *See, e.g.*, National Academy of Sciences, *Energy In Transition 1985-2010: Final Report of the Committee on Nuclear and Alternative Energy Systems* 422-99 (1979). In contrast, renewable sources pose much less threat to the environment and to public health, and conservation offers environmental and health improvements. *See id.*

Perhaps the most dangerous threat from long-term worldwide overutilization of fossil fuels is the "greenhouse effect." By burning hydrocarbons that have been locked underground for eons, industrial man is increasing the carbon dioxide in the atmosphere. The atmospheric concentration of this gas has risen ten percent just since 1958. *Id.* at 470. Because of the wavelengths of electromagnetic radiation that carbon dioxide absorbs, it acts like the glass roof of a greenhouse and reduces the heat that can be radiated away from the earth. According to present estimates, by the year 2040 the additional carbon dioxide could raise global and polar temperatures enough to effect major shifts in humidity, cloudiness, and rainfall. *Id.* at 471. Such changes "could create deserts of much of the Northern Hemisphere breadbasket. It would be an irreversible catastrophe of unparalleled magnitude, affecting all mankind." National Geographic Society, *supra*, at 22.

The nation's only course, therefore, is to reduce energy consumption, to make more efficient use of the resources that we deplete, and to develop new, renewable sources of energy. Because of the decentralized decisionmaking involved, these goals require a consistently implemented national program.[7] "[T]he decentralized character of energy consumption means that decisions to conserve,

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[7] *See, e.g.*, Energy Future, *supra*, at 7 ("[A] serious, not just rhetorical, energy conservation program depends on a set of incentives framed by the government that would satisfy energy users and help create businesses that can 'deliver' conservation to the homeowner.").

unlike decisions to produce energy, have to be made by millions and millions of often poorly informed people. . . . Like conservation, [renewable] energy faces a problem of decentralized decision-making." *Energy Future, supra,* at 10. A national program is, therefore, essential for our country to influence these decentralized decisions in a coherent way and thus to reduce the severity of the impending crisis.

B. By Encouraging Both More Efficient Use Of Nonrenewable Energy Sources And More Rapid Development Of Renewable Sources, The Challenged Provisions Of PURPA Deal With Significant Aspects Of The Overall Problem

The challenged statutory provisions create financial incentives for conservation and efficiency, for cogeneration of electricity with some other useful form of energy, and for the development of renewable sources of energy. The provisions also encourage more equitable practices toward consumers.

1. *Conservation and Efficiency*

Conservation and efficiency are as much sources of energy as a newly discovered domestic oil field.[8] Titles I and III encourage utility rates that give consumers incentives to use energy efficiently. The scope of possible savings from rate-motivated efficiency was dramatically demonstrated in Los Angeles during the Arab oil embargo of 1973-74, when the city effected reductions of seventeen percent of the prior year's usage. *Energy Future, supra,* at 176-77. The rate incentives for efficiency encouraged by titles I and III thus offer the hope of significantly increasing the nation's available energy without damaging the environment.

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[8] "The cleanest, least expensive, and least vulnerable energy option today is to use less by being more efficient." National Geographic Society, *supra,* at 23. *Accord,* Energy Future, *supra,* at 168; National Academy of Sciences, *supra,* at 4.

Title I, moreover, advances efficiency not only in the amount but in the timing of electricity use.[9] Utilities must have generating facilities sufficient to meet consumers' needs during periods of peak demand, even if the facilities stand idle at other times. To the extent that consumers shift their demand for electricity into off-peak time periods, more efficient use is made of utilities' existing generating capacity, and the need for costly new facilities is reduced. *See* S. Rep. No. 95-442, 95th Cong., 1st Sess. 9 (1977).

2. *Cogeneration—"Industry's North Slope"*

PURPA also encourages cogeneration, which is one of the most promising ways of using energy efficiently. For instance, in producing steam for industrial processes or heating, combustion at temperatures up to 3600° often yields high-temperature steam that need not be any hotter than 400°. Instead of merely wasting the extra energy, it is possible to use the high-temperature (high-pressure) steam to drive a turbine that generates electricity. Even after having passed through the turbine, the steam retains enough heat energy to fulfill its originally intended use.

The amount of energy to be saved by cogeneration is enormous. Industry accounts for over one third of America's energy utilization, and fifteen percent of the amount that industry uses could be saved by cogeneration. *See* National Geographic Society, *supra*, at 52. In recognition of its great potential, cogeneration has been called "Industry's North Slope." *See Energy Future*, *supra*, at 197.

Ironically, cogeneration was more common several decades ago than it is today, and a major reason for the decline has been the hostile attitude of electric utilities. *See Energy Future*, *supra*, at 199-200. Since an industrial plant's need for steam does not always coincide with its need for electricity, cogeneration tends to be economi-

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[9] *See* 16 U.S.C. § 2621(d)(3)-(6) (Supp. III 1979) (establishing federal standards re time-of-day rates, seasonal rates, interruptible rates, and load management techniques).

cal only if the cogenerator receives the cooperation of an electric utility. The utility must supply backup electric service for times when the plant needs electricity but not steam, and it must buy the cogenerator's excess electricity when the plant needs steam but not all of the electricity that the steam can produce before its industrial use. For a variety of reasons, however, electric utilities have tended to charge cogenerators very high rates for backup electric service and to offer them very low rates for the electricity that they produce.[10]

In addition, some potential cogenerators have feared that if they sold even a small amount of electricity to an electric utility, they might themselves be declared public utilities, subject to extensive regulation of their operations, their financing, and their profits. This fear, combined with the lack of cooperation from the utilities, greatly discouraged industrial cogeneration in America.[11]

Section 210 of PURPA attacks such institutional barriers to cogeneration. It requires an electric utility to provide backup service to qualifying cogenerators at nondiscriminatory rates and requires such a utility to purchase a cogenerator's excess electricity at rates that are just and reasonable to the utility's consumers, that are in the public interest, and that do not discriminate against the cogenerator. Also, it exempts qualifying cogenerators from some federal and state regulation. The section thus frees the inherent financial advantages of cogeneration from artificial institutional disincentives that have burdened it.

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[10] *See, e.g.*, General Accounting Office, Electricity Planning—Today's Improvements Can Alter Tomorrow's Investment Decisions 34 (1980) [hereinafter cited as Electricity Planning]; General Accounting Office, Industrial Cogeneration—What It Is, How It Works, Its Potential 52-53 (1980).

[11] *See, e.g.*, H.R. Rep. No. 95-1750, 95th Cong., 2d Sess. 98 (1978) (conference report); Congressional Research Service, The Electric Utility Sector: Concepts, Practices, & Problems, House Subcomm. on Energy & Power of the House Comm. on Interstate & Foreign Commerce, 95th Cong., 1st Sess. 52-54 (Comm. Print 95-14 1977).

The section has proved effective. Responding to the inherent financial incentives for cogeneration, industries across the country have begun to capture as electricity, and to sell, much of the energy that they previously had wasted.[12]

3. *Renewable Energy Sources*

The benefits provided by section 210 as incentives for cogeneration are also provided as incentives for the development of renewable energy sources.

Within two decades renewable energy resources can supply a major portion of America's needs. The Energy Project at the Harvard Business School concluded "that it is entirely possible for solar to meet as much as a fifth of the country's energy needs by the year 2000—in absolute terms, the equivalent of the current amount of imported oil." *Energy Future, supra,* at 231.[13] In explaining their confidence in the practicality of renewable energy sources, the Energy Project authors stated: "Technological breakthroughs are not required . . . . What does stand in the way is a series of economic and institutional barriers . . . ." *Id.* at 231-32 (footnote omitted).

The same institutional barriers that have discouraged cogeneration have also discouraged the production of electricity from solar energy (broadly defined), from waste, and from geothermal energy. Accordingly, the incentives afforded by section 210 as described above are

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[12] *See, e.g.*, Baum, *Outside Investors Spark Growth of Cogeneration*, Energy User News, July 20, 1981, at 1; Larson, *Industry Examines Profit Prospects of Selling "Cogeneration" Energy*, Wall Street J., Feb. 19, 1981, at 33.

[13] As used by these scholars and by the Department of Energy, the term "solar" includes, in addition to more obviously sun-related processes, the production of electricity from the combustion of plant matter, from the wind, and from hydroelectric dams. Technologies that are encouraged by PURPA account for nearly half of the total potential. *See* 1 Solar Energy Research Institute, Report on Building a Sustainable Future, House Comm. on Energy & Commerce, 97th Cong., 1st Sess. at xxviii (Comm. Print 97-K 1981).

equally important to generators who produce electricity from renewable resources.

Like its cogeneration provisions, section 210's incentives for the development of renewable sources of energy are already bearing fruit. Additional electricity is being generated today, and, even more important, the existence of the incentives is attracting capital to the infrastructure that will also serve the generators of tomorrow.[14] In the words of one commentator, PURPA "is already having a revolutionary impact on the economics of small-scale renewable power technologies." D. Deudney, *Rivers of Energy: The Hydropower Potential*, Worldwatch Paper 44, at 35 (1981).

4. *Consumer Equity*

Even beyond their role in reducing dependence on nonrenewable energy sources, title I, section 210, and title III are of great importance to consumers. In recent years the cost of fuel and the cost of large electricity generating facilities have skyrocketed. Prices, or rates, based upon PURPA considerations encourage not only conservation but also alteration and shifting of customer load patterns, thereby minimizing capital and fuel costs. Such rates will better assure the delivery of energy services at least total cost. By eliminating or mitigating certain subsidies, implementation of rates embodying PURPA considerations results in the develop-

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[14] Not only are people using windmills to make electricity, but an industry is emerging that will provide them with better windmills to erect; not only are old dams being reactivated all over New England, but firms are starting to develop and market more sophisticated hydroelectric equipment and expertise. *See, e.g.*, Norman, *Renewable Power Sparks Financial Interest: Decentralized Electricity Production Is Getting a Boost from a New Federal Law and Tax Credits, but Both Are Under Attack*, 212 Science 1479 (1981); Shenon, *Hot Times in Hydropower, with a Little Help from Congress: A Little-Noticed Part of a 1978 Law Has Spawned a New Breed of Entrepreneur*, New York Times, July 12, 1981 § 3 (Business), at 6. *See generally*, McPhee, *Minihydro*, New Yorker, Feb. 23, 1981, at 44.

ment of renewable energy sources under more competitive market conditions.[15]

In addition, titles I and III directly further more equitable treatment of energy consumers. Some provisions increase consumers' ability to understand and control their energy use.[16] Others promote equitable and energy-efficient rates based primarily on cost of service.[17] Still others encourage utility policies that safeguard the public welfare.[18]

Thus PURPA constitutes an important step in reducing the total cost of electricity and in employing actual cost of service as a guide more fairly to distribute that total cost among all electricity users. Even before the enactment of PURPA, many states, including Maryland, independently had begun adopting rate standards similar to those established by PURPA. *See* National Associa-

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[15] As America's most capital-intensive industry, electric utilities estimate that their capital requirements for new power plants will be approximately a third of a trillion dollars during the 1980's. *See* Electricity Planning, *supra* note 10, at 15. In 1977 the electric utility industry accounted for almost a quarter of all industrial expenditures for new plant and equipment, a proportion that has been steadily rising. M. Ross & R. Williams, Our Energy: Regaining Control 43-44 (1981).

[16] *See, e.g.*, 16 U.S.C. § 2623(b)(1), (3) (Supp. III 1979) (standards re prohibition of master metering in new buildings and re transmission of rate information to consumers); *id.* § 2643 (requirement that utilities gather cost-of-service information needed by consumers and regulators for rational consideration of rate requests and rate designs).

[17] *See* 16 U.S.C. §§ 2621(d)(1)-(2), 2623(b)(2), (5) (Supp. III 1979) (standards re cost-of-service rates, re prohibition of declining block rates and automatic adjustment clauses, and re allocation of certain advertising costs to a utility's owners).

[18] *See id.* §§ 2623(b)(4), 2624 (standard re procedures for termination of electric service and requirement to consider lifeline rates). Analogous provisions regarding advertising, *see* note 17 *supra*, and procedures for termination apply to gas utilities. *See* 15 U.S.C. § 3202(b).

tion of Regulatory Utility Commissioners, *1978 Annual Report on Utility & Carrier Regulation* 574-95 (1979). PURPA was and is catalytic in breaking down institutional barriers to repricing electricity. It creates a centralized body of data and literature to be examined by all the states at the same time, to the end that all would establish pricing regimes that encourage conservation, efficiency, and equity. Most important, each state conducts the examination free from the fear that it is alone in doing so. If this Court strikes down titles I and III, this enlightened, joint state-federal momentum faces destruction.

5. *Conclusion*

Thus, not only does the gravity of the impending crisis necessitate a national program, but the challenged provisions contribute greatly to the success of that program.

II. THE CHALLENGED PROVISIONS DO NOT POSSESS THE THREE ATTRIBUTES THAT MUST BE PRESENT IF THE TENTH AMENDMENT IS TO BE VIOLATED

When Congress acts under its commerce power, a two-stage analysis determines whether the enactment violates the tenth amendment. First, there is a tripartite threshold inquiry to see whether the tenth amendment is implicated at all. Second, if the tripartite test shows that the tenth amendment is involved, a balancing test establishes whether the federal interest advanced justifies the law in question.[19]

This Court recently articulated that threshold test. Explaining the seminal case of *National League of Cities v. Usery*, 426 U.S. 833 (1976), the opinion in *Hodel v. Virginia Surface Mining & Reclamation Association*, 101

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[19] *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. at 2366 & n.29; National League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring).

S. Ct. 2352 (1981), stated that in order for the tenth amendment to be implicated, three factors must all be present:

> [A] claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.*, at 845. And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.*, at 852.

Id. at 2366 (emphasis in original, footnote omitted). The challenged provisions involve none of these three criteria.

In recommending implementation of federal rate standards, titles I and III reserve to state regulatory authorities the final decision regarding the adoption of those standards. *See* 16 U.S.C. §§ 2621(a), 2623(a), 2627(b) (Supp. III 1979); 15 *id.* §§ 3203(a), 3208. Since the states remain completely free to reject the standards, no compulsion of the states is involved, and thus none of the three *Virginia Surface Mining* attributes is present.[20]

The *substantive* provisions of section 210 comply with the tenth amendment because preempting state regulatory policy does not constitute regulating the states as states. Section 210 regulates rates and service relationships between utilities and their customers, and thus

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[20] Although PURPA does require that due process be observed in state consideration of the recommended rate standards, the consequent inconvenience to states is *de minimis*, and so neither state sovereignty nor the structure of integral state operations is affected. Moreover, Congress may constitutionally require the states to observe due process. *See* City of Rome v. United States, 446 U.S. 156, 178-80 (1980).

preempts any contrary state regulatory policies. But as this Court said in *Virginia Surface Mining*, it is "incorrect" to "assume that the Tenth Amendment limits congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce." 101 S. Ct. at 2367. Accordingly, the imposition of obligations on Mississippi public utilities does not constitute the regulation of Mississippi as a state.

The *implementation* provisions of section 210 also comply with the tenth amendment. As interpreted by the Federal Energy Regulatory Commission ("FERC"), these provisions require no more than that federal rules be respected in the administrative adjudication by state authorities of certain controversies involving electric utilities over which the authorities have jurisdiction under state law.[21] *See* discussion below at pages 16-18. Since it displaces some state regulatory policies, section 210 admittedly prescribes the *result* in state adjudications between private parties. Tenth amendment concerns, however, are absent because none of the decisions that section 210 preempts concern the *structure* of state operations, integral or otherwise. The implementation provisions thus do not "directly displace [Mississippi's] freedom to *structure* integral operations in areas of traditional governmental functions." *National League of Cities*, 426 U.S. at 852 (emphasis added). The structure of the state's adjudicatory process is no more constrained here—and the tenth amendment is no more offended here—than they are every time a traditional state court is obliged to respect a federal rule of decision.

In short, title I, section 210, and title III raise none of the specters of serious interference with state operations and prerogatives that is necessary if the tenth amendment is to be violated.

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[21] "[N]othing in the concept of our federal system prevents state courts from enforcing rights created by federal law." Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507 (1962).

III. THE CONSTITUTIONALITY OF SECTION 210 IS ESTABLISHED BY THE PRINCIPLE OF *TESTA v. KATT* THAT CONGRESS MAY ENACT FEDERAL RULES OF DECISION THAT MUST BE RESPECTED IN A STATE TRIBUNAL'S ADJUDICATION OF PRIVATE CONTROVERSIES

Given that the substantive obligations imposed on electric utilities by section 210 comply with the tenth amendment, the principle of *Testa v. Katt*, 330 U.S. 386 (1947), establishes the constitutionality of the section's implementation provisions. As suggested above, the core argument is quite simple: State tribunals, even administrative ones, must respect preemptive federal rules of decision. In developing this analysis, we establish: (1) Section 210 imposes requirements on the MPSC only in the MPSC's role as a tribunal and not in its quasi-executive or quasi-legislative capacities; (2) *Testa* holds that a state tribunal must enforce federal rights, at least in circumstances where the tribunal would enforce the same rights if the rights arose under state rather than federal law; (3) if electric utilities' obligations under section 210 derived from Mississippi law rather than from federal law, the MPSC in its quasi-judicial capacity would enforce the private rights created by those obligations; and (4) the supremacy clause and the *Testa* holding apply to the MPSC's administrative adjudication no less than they do to adjudication that Mississippi allocates to its traditional state courts. Congress therefore acted constitutionally when it required adjudicatory enforcement by the MPSC of private rights arising under section 210.

A. Section 210 Requires Only Adjudicatory Performance On The Part Of State Regulatory Authorities

Section 210 requires no more than quasi-judicial action by the MPSC. The section imposes the following requirement on the MPSC: "[*E*]*ach State regulatory authority shall*, after notice and opportunity for public hearing, *implement* such rule (or revised rule) [prescribed by the FERC] for each electric utility for which it has ratemaking authority." 16 U.S.C. § 824a-3(f)(1)

(Supp. III 1979) (emphasis added). As the FERC interpreted the requirement, adjudicatory action alone is sufficient: "[I]mplementation may consist of the issuance of regulations, *an undertaking to resolve disputes between qualifying facilities and electric utilities* arising under subpart C [of the regulations under section 210 of PURPA], or any other action reasonably designed to implement such subpart (other than § 292.302 thereof)." 18 C.F.R. § 292.401(a) (1980) (emphasis added).[22]

Thus, pursuant to the FERC interpretation, section 210 requires from the MPSC neither quasi-executive initiative nor quasi-legislative discretion. The section is therefore distinguishable from a federal program that requires the passage of legislation or the promulgation of regulations. *See generally, Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977) (per curiam).[23] Instead, the MPSC may satisfy the statute merely by

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[22] Contemporaneous interpretation of a statute by the agency charged with its administration is entitled to great deference. *See, e.g.*, Fulman v. United States, 434 U.S. 528, 533 (1978). Deference is especially appropriate when the administrative interpretation avoids or reduces serious constitutional questions that the statute might otherwise raise. *See, e.g.*, Califano v. Yamasaki, 442 U.S. 682, 692-94 (1979). Accordingly, this Court should accept the FERC's interpretation of section 210 as requiring nothing of the MPSC other than adjudicatory action.

[23] No quasi-legislative activity by the MPSC is mandated by the requirement in the regulations promulgated by the FERC under section 210 that electric utilities put into effect standard rates for purchases from qualifying facilities with a design capacity of one hundred kilowatts or less. *See* 18 C.F.R. § 292.304(c)(1) (1980). Responsibility for the creation, as opposed to the approval, of a rate schedule falls on the utility rather than on the MPSC. *See* Miss. Code Ann. §§ 77-3-35 to -39 (1972). Moreover, under Mississippi law, "rate-making" and "price-fixing" are deemed adjudicatory in nature. *See id.* § 25-43-3(b) (Supp. 1980).

The MPSC is invited voluntarily to use its rulemaking powers in implementing rules prescribed by the FERC. Since the tenth amendment is concerned only with mandatory limitations on states' freedom, the nonmandatory invitation to issue regulations in no way detracts from section 210's constitutionality.

applying a federal rule of decision in the adjudication of disputes involving those electric utilities for which it has responsibility under state law.[24]

B. *Testa v. Katt* Holds That The Supremacy Clause Requires A State Tribunal To Enforce A Right Arising Under Federal Law, At Least If The Tribunal Would Enforce An Analogous Right Arising Under State Law

Testa v. Katt, 330 U.S. 386 (1947), reaffirms the duty of state adjudicatory bodies to apply and enforce federal law. In that case, the plaintiff had sought treble damages and costs pursuant to a federal price control law. Objecting to the remedy, the Rhode Island courts refused to enforce the federal provisions. This Court, however, reasserted that "the obligation of states to enforce . . . federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide." 330 U.S. at 391.

It was significant in *Testa* that Rhode Island's courts unquestionably would have had the power under state law to enforce the provisions at issue if the provisions had been enacted by the state rather than the federal legislature: "It is conceded that this same type of claim arising under Rhode Island law would be enforced by that States' courts." *Id.* at 394. In such a case, "the State courts are not free to refuse enforcement of petitioners' claim." *Id.* (citation omitted). The same factor is present here.[25]

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[24] In fact, the challenged provisions leave states entirely free to decide whether to regulate energy utilities. Only if a state chooses to assume jurisdiction over such utilities does it incur federal obligations. States' ability thus to avoid the federal obligations prevents the provisions from violating the tenth amendment. *See Virginia Surface Mining*, 101 S. Ct. at 2366 & n.30; Brown v. Environmental Protection Agency, 566 F.2d 665, 673 (9th Cir. 1977).

[25] It is irrelevant that the tribunals at issue in *Testa*, unlike the MPSC, possessed general jurisdiction. A limitation on jurisdiction might be relevant under *Testa* to show that a state tribunal

Testa and *Virginia Surface Mining* thus stand for the proposition that the tenth amendment places no limits on Congress' power to affect the content—as opposed to the structure—of state adjudication. Whatever may be the tenth amendment restrictions on federal ability to tell state executives and legislators what to do, Congress' preemptive power allows it to prescribe the results that shall be reached by state adjudicators, at least with respect to subject matter within the adjudicators' existing state law jurisdiction.[26]

Of course, if the tenth amendment barred the substance of the obligations created by a proposed enact-

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would not enforce an analogous state law, but, within the area of the tribunal's jurisdictional competence, such a limitation does not allow the tribunal to discriminate against federal law.

[26] We show below that the MPSC would have jurisdiction to enforce electric utilities' obligations under section 210 in the event that section 210 arose under Mississippi law. Accordingly, Mississippi and the MPSC lack standing to raise the question of whether some hypothetical state regulatory authority might fall within the language of section 210 yet not have such jurisdiction under existing state law. *See* Warth v. Seldin, 422 U.S. 490, 499 (1975).

If Mississippi had standing to raise that issue *and* if such a hypothetical state regulatory authority existed, this Court would confront the difficult question of whether Congress may require a state tribunal to enforce federal law even when the tribunal would not have jurisdiction over the claim if the claim arose under state law. That question presently is unresolved. *See* Martinez v. California, 444 U.S. 277, 283 n.7 (1980); *cf.* Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 Wm. & Mary L. Rev. 725, 759-66 (1981) (arguing that Congress possesses such power). *See also* Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 298 (1973) (Marshall, J., concurring).

Whether or not Mississippi has standing to raise that difficult question, the instant case does not demand an answer to it. Section 210 requires a state regulatory authority to apply a federal rule of decision only to those utilities for which the state agency, under existing state law, has ratemaking authority. The section imposes no obligation on any state agency in circumstances where the agency does not have such jurisdiction under state law.

ment, Congress could not avoid that limitation by couching the enactment as a rule of decision to be enforced by state tribunals. But where, as here, the substantive obligation runs between private entities, Congress may require state adjudicators to respect it. Any other result would treat the tenth amendment as a partial repeal of the supremacy clause.

C. In Its Adjudicatory Capacity, The MPSC Would Resolve Disputes Arising Under Section 210 If Section 210 Were Mississippi Law

If the substantive provisions of section 210 arose under Mississippi law, the Mississippi Public Service Commission would have ample jurisdiction to enforce them. The MPSC is authorized to adjudicate disputes[27] and is required by state law to maintain a "docket of petitions and complaints," constituting the "cases" of which it must dispose. Miss. Code Ann. § 77-1-31 (1972).[28] The disputes subject to the MPSC's authority are diverse and comprehensive, because, subject to limitations not here relevant, Mississippi law gives the agency "exclusive original jurisdiction over the intrastate business and property of public utilities." *Id.* § 77-3-5 (1972). The MPSC's power to hold hearings reflects this open-ended grant of quasi-judicial authority.[29]

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[27] *See, e.g.*, Mississippi Public Service Commission, Utility Rules of Practice & Procedure, Rule 4, § A, para. 2 (no date) (Formal Complaints) ("[A]ny consumer or prospective consumer of any utility service may complain in writing to the commission with respect to service, furnishing of service, or any discrimination with respect to any service or rates.").

[28] The parties before the MPSC in such cases are called "complainants" and "defendants." *See id.* § B.

[29] *See* Miss. Code Ann. § 77-3-47 (Supp. 1980).

D. Obligations Under The Supremacy Clause, Such As That Established By *Testa*, Are Not Avoided By A State's Decision To Vest Adjudicatory Jurisdiction In An Administrative Agency Rather Than In Traditional State Courts

1. *The Supremacy Clause Imposes on State Adjudicators a Special Duty to Respect Federal Law*

State adjudication is a matter of particular concern to the Constitution. Although all state officials must bind themselves to support the Constitution,[30] state adjudicators are singled out for special federal obligations: "[T]he Judges in every State shall be bound [by the Constitution, laws, and treaties of the United States], any Thing in the Constitution or Laws of any State to the Contrary not withstanding." U.S. Const. art. VI, para. 2.

The special constitutional obligations imposed on state tribunals, including the obligation established by *Testa*, are required by the nature of the adjudicatory process. In establishing the enforceable rights of parties that are before it, a tribunal necessarily applies a body of law[31] to a collection of evidence, some of which may be in dispute. Federal law would be derogated to an intolerable second-class status if a state tribunal might establish the existence or nonexistence of enforceable rights as if federal law did not exist. *See, e.g., Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-41 (1816).[32]

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[30] *See* U.S. Const. art. VI, para. 3.

[31] *See, e.g.*, Fuller, *The Forms & Limits of Adjudication*, 92 Harv. L. Rev. 353, 373 (1978) ("[A]djudication cannot function without some standard of decision . . . .").

[32] Similarly, it is insufficient merely to provide for appeal to (or judicial review in) a forum in which federal law will be respected. *See, e.g.*, People v. Western Union Tel. Co., 70 Colo. 90, 198 P. 146 (1921). Such a scheme would ignore the significance of mixed questions of fact and law and would discriminatorily increase the cost of asserting federal rights.

2. *The Factors That Necessitate Respect for Federal Law on the Part of Traditional State Courts Apply Equally to State Administrative Tribunals*

Like a traditional state court, a state administrative adjudicatory body such as the MPSC applies a corpus of law to a mass of data in order to establish the enforceable rights of the parties before it. For instance, the MPSC makes findings, the findings are prima facie correct, and a reviewing court may not substitute its own judgment for that of the MPSC where there is a substantial basis in the evidence for the MPSC's findings.[33] More important, the MPSC determines the legal consequences of the facts it has found. Finally, although it does not enforce its own decisions, the MPSC may apply to a state court to compel compliance; and it may institute an action for violation. Miss. Code Ann. § 77-1-43 (1972). Because real and significant consequences thus flow from the MPSC's application of law to the evidence before it, the supremacy of federal law would be unconstitutionally compromised if the MPSC were not required to respect federal rules of decision.

The need to apply the supremacy clause to administrative tribunals is accentuated by the freedom that states have to transfer adjudication from traditional courts to administrative agencies.[34] If agency adjudication were not bound by the supremacy clause, such a transfer would in effect release a state from its constitutional obligation to enforce relevant federal law.[35] Moreover,

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[33] *See, e.g.*, Mississippi Pub. Serv. Comm'n v. Illinois Cent. R.R., 235 Miss. 46, 108 So. 2d 573 (1959) (case decided under the 1942 Code).

[34] *See, e.g.*, Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976) (malpractice hearing panels), *cert. denied*, 429 U.S. 1041 (1977); Rosenthal v. Hartnett, 36 N.Y.2d 269, 326 N.E.2d 811, 367 N.Y.S. 2d 247 (1975) (adjudication of traffic infractions).

[35] For instance, a state administrative body with responsibility for effecting an equitable division of property in case of divorce

if state administrative tribunals were not required to enforce federal law, then the mechanisms for the enforcement of such law would be unduly limited.[36]

3. *There Are No Countervailing Considerations That Argue for the Inapplicability of the Supremacy Clause to State Administrative Agencies*

The "hybrid" [37] nature of state administrative agencies does not relieve them of obligations they otherwise have to enforce federal law. Like traditional judicial activity, quasi-judicial activity involves the application of a body of law to a mass of evidence. Thus the quasi-judicial nature of agency adjudication is in no way reduced by agencies' possession, for other purposes, of quasi-

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might be free to ignore the decision of this Court in McCarty v. McCarty, 101 S. Ct. 2728 (1981).

An analogous question occurs in connection with state agencies that determine whether individual motor vehicles qualify for state registration and licensing (a type of informal administrative adjudication, *cf.* 5 U.S.C. § 551(4)-(7) (1976) (the definition of adjudication in the federal Administrative Procedure Act)). Congress may constitutionally require that, in making the registration and licensing determination, such agencies respect a federal rule of decision that vehicles should not be registered or licensed if they have failed a federal pollution inspection. *See* United States v. Ohio Dep't of Highway Safety, 635 F.2d 1195, 1204-05 (6th Cir. 1980), *cert. denied*, 101 S. Ct. 2031 (1981); Brown v. Environmental Protection Agency, 566 F.2d 665, 673 (9th Cir. 1977) (dictum).

[36] Either Congress would have to provide for additional removal to the already overburdened federal courts, or it would have to attempt to restrict states' ability to transfer adjudicatory responsibilities from state courts to state agencies. Unlike section 210, which concerns only the content of adjudication by state regulatory authorities, such a restriction would affect the structure of state operations and thus might raise serious tenth amendment questions.

[37] It is the identifying characteristic of modern administrative agencies that they combine quasi-judicial power with quasi-legislative rulemaking authority, and often with quasi-executive initiative as well. *See* 1 F. Cooper, State Administrative Law 17 (1965); 1 K. Davis, Administrative Law Treatise § 3:11, at 192 (2d ed. 1978).

executive and quasi-legislative capacities.[38] Quasi-judicial activity, therefore, fully invokes the policies that underlie the supremacy clause.

Historical analogy confirms the applicability of the supremacy clause to administrative tribunals. Although modern administrative agencies and modern public utilities were unknown when the Constitution was written, state common law courts had substantial responsibility for the regulation of privately owned business whose operation affected the public interest.[39] Thus state regulation of the predecessors of utilities fell within the requirement that "the Judges in every State" be bound by federal law. U.S. Const. art. VI, para. 2. Accordingly, the word "Judges" should today comprehend nominally administrative decisionmakers performing adjudicatory functions in the regulation of public utilities.

In other areas, this Court and lower courts have been guided not by the placement of an adjudicatory process within a government but by the functional comparability between that process and adjudication in a traditional court.[40] For instance, "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages." *Butz v. Economou*, 438 U.S. 478, 512-13 (1978). In appropriate cases, a state administrative

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[38] In fact, as part of the 18th century colonial background to the Constitution, "[t]he court at the top was almost always more than a court—the governor and council, either as such or sitting as a special high court." L. Friedman, A History of American Law 44 (1973).

[39] *See, e.g.*, M. Horwitz, The Transformation of American Law, 1780-1860 at 118-19 (1977) (describing common law treatment of mills, which were regarded in the colonies as "the leading species of public service enterprise" (footnote omitted)).

[40] *See* Butz v. Economou, 438 U.S. 478, 513 (1978) ("[T]he role of the modern federal hearing examiner or administrative law judge within this framework is 'functionally comparable' to that of a judge.").

agency may be held to be a "State court" for purposes of the removal statute, 28 U.S.C. § 1441(a) (1976).[41]

These analogous precedents thus reinforce the appropriateness of applying the supremacy clause to adjudication conducted by the MPSC. For purposes of immunity and of removal, functional comparability flows from court-like procedures (and in fact many of the MPSC's procedures are very similar to those found in traditional courts[42]), but for purposes of the supremacy clause, functional comparability resides less in particular procedures than in the adjudicatory process of applying law to facts. Because such application is at the core of the MPSC's adjudication, the supremacy clause requires the MPSC to enforce relevant federal law.

IV. EVEN IF THE CHALLENGED SECTIONS OF PURPA POSSESSED ALL THREE THRESHOLD CHARACTERISTICS OF VIOLATIONS OF THE TENTH AMENDMENT, THE CONSTITUTIONALITY OF THE SECTIONS WOULD BE ESTABLISHED BY THE SEVERITY OF THE NATIONAL PROBLEMS THAT REQUIRED THEIR ENACTMENT

Even on the assumption that title I, section 210, and title III of PURPA meet the tripartite threshold test for a commerce clause violation of the tenth amendment, such a violation is avoided, and the provisions are justi-

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[41] *See, e.g.*, Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1102 (7th Cir. 1979); Volkswagen de P.R., Inc. v. Puerto Rico Labor Relations Bd., 454 F.2d 38, 44 (1st Cir. 1972).

[42] *See, e.g.*, Miss. Code Ann. § 77-1-33 (1972) (compulsory process); *id.* § 77-1-35 (affidavits and sworn testimony, falsehood in which constitutes perjury); *id.* § 77-1-37 (per diem and mileage reimbursement for witnesses "the same . . . as [for] witnesses attending the circuit court"); *id.* § 77-1-39 (the right to a sworn stenographer); *id.* § 77-1-41 (requirement that findings and determinations be made in writing and that records of MPSC proceedings be deemed a public record subject to public inspection). *See generally* Mississippi Public Service Commission, Utility Rules of Practice & Procedure.

fied, by the balance between the gravity of the federal concerns addressed and the minimal state inconvenience imposed. "There are situations in which the nature of the federal interest advanced may be such that it justifies State submission." *Virginia Surface Mining*, 101 S. Ct. at 2366 n.29 (citation omitted).

With America's economic health and autonomy at stake, PURPA is an exceedingly restrained response to a situation of overriding gravity. As shown above at pages 4-7, significant and swift reduction in the nation's consumption of fossil fuels and rapid development of renewable sources of energy are urgently needed to minimize severe disruption in the national economy. Only collective national action can provide the coherent incentives that are needed to alter our national pattern of energy consumption and electricity production.

Thus the present case is more like *Fry v. United States*, 421 U.S. 542 (1975), than like *National League of Cities*. These two cases came to different conclusions regarding application to the states of statutes that appear remarkably similar. *Fry* rejected a tenth amendment challenge to a federal wage-control statute. *National League of Cities*, on the other hand, reached the opposite result concerning a federal minimum-wage statute, but the case nevertheless reaffirmed *Fry*. Despite the similarity of the statutes involved, *Fry* was considered inapposite because "[t]he enactment at issue there was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall." 426 U.S. at 853.

Additionally, in distinguishing *Fry*, *National League of Cities* noted that care had been shown in the drafting of the statute at issue in *Fry* to minimize the interference with states' freedom and that that statute had been temporary in nature. In drafting PURPA, Congress showed no less care in minimizing displacement of

state regulatory policies regarding energy utilities. *See, e.g.*, H.R. Rep. No. 95-1750, 95th Cong., 2d Sess. 71 (1978) (conference report). To the extent that titles I and III impose any obligations on the states, the obligations are temporary. Although section 210 imposes permanent rather than temporary obligations, the threat to which it is a response is a permanent one and, because of the permanence, is all the more threatening to the well-being of the entire federal system. Accordingly, the balance between state and federal interests falls decisively on the side of PURPA's constitutionality.

V. GIVEN CONGRESS' RELIANCE ON ITS NATIONAL SECURITY POWERS WHEN IT ENACTED PURPA, THE CONSTITUTIONALITY OF THE CHALLENGED SECTIONS IS EASILY ESTABLISHED

A. Congress Had Reasonable Grounds To Believe That PURPA Would Help Protect National Security

In enacting PURPA, Congress invoked not only its power to regulate commerce, but also its power to protect national security. *See* 16 U.S.C. § 2601 (Supp. III 1979).[43] This latter power, *see* U.S. Const. art. I, § 8, paras. 11-18, constitutes an independent and sufficient justification for the statute.

Title I, section 210, and title III seek to alter patterns of energy utilization that directly threaten America's physical security in a number of ways. Most generally, wasteful utilization of energy and over-dependence on foreign sources of supply weaken the economic foundations on which our military strength is based, and the

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[43] By the time it enacted PURPA, the Ninety-Fifth Congress had reached the fundamental conclusion that the energy crisis imperiled America's safety. *See, e.g.*, Department of Energy Organization Act, Pub. L. No. 95-91, § 101, 91 Stat. 565 (1977) (codified at 42 U.S.C. § 7111) ("The Congress of the United States finds that—(1) the United States faces an increasing shortage of nonrenewable energy resources; [and] (2) this energy shortage and our increasing dependence on foreign energy supplies present a serious threat to the national security of the United States . . . .").

foreign-policy disadvantages of that dependence are substantial. More specifically, section 210 works to reduce two forms of national vulnerability—not only the vulnerability that results from insecure availability due to dependence on foreign supplies,[44] but also vulnerability to devastating attack on, or sabotage of, a centralized national energy system.[45] By encouraging the production of electricity from renewable resources, which are domestically available, section 210 reduces the nation's dependence on foreign sources of energy supply,[46] and by virtue of their wide geographic dispersion, cogenerators and small power producers are more difficult to incapacitate all at once.[47]

B. The Challenged Provisions Easily Meet The Tenth Amendment Standard That Is Applicable To Enactments That Protect National Security

This Court has suggested the appropriateness of a less exacting tenth amendment test for national security enactments than for commerce regulation. Noting that "[n]othing we say in this opinion addresses the scope of Congress' authority under its war power," the opinion in *National League of Cities*, 426 U.S. at 854 n.18, stated explicitly that *Case v. Bowles*, 327 U.S. 92 (1946),

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[44] *See, e.g.*, S. Rep. No. 96-387, 96th Cong., 1st Sess. 5-6 (1979) (to accompany the bill that became the Energy Security Act).

[45] *See, e.g.*, General Accounting Office, Federal Electrical Emergency Preparedness Is Inadequate 8-9 (1981).

[46] *See, e.g.*, S. Rep. No. 96-387, *supra* note 44, at 151 (quoting or paraphrasing a message from the President) ("Every solar collector in this country, every investment in using wind or biomass energy, every advance in making electricity directly from the sun decreases our reliance on uncertain sources of imported oil, bolsters our international trade position, and enhances the security of our Nation.").

[47] *See, e.g.*, Dispersed, Decentralized and Renewable Energy Sources: Alternatives to National Vulnerability & War, Final Report of the Energy & Defense Project for the Federal Emergency Management Agency (1980) (National Technical Information Service AD-A094 319).

was not overruled. *Case* had upheld the application of federal price controls to sales that a state had undertaken in order to raise money for its schools. "[T]he State's power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry on war. . . . [T]he Tenth Amendment 'does not operate as a limitation, upon the powers, expressed or implied, delegated to the national government.'" *Id.* at 102 (footnote omitted) (quoting *Fernandez v. Wiener*, 326 U.S. 340, 362 (1945)).

Court of appeals cases decided since *National League of Cities* unanimously indicate that congressional reliance on national security powers, as opposed to reliance on the commerce power, is a factor in favor of a statute's constitutionality in the face of a tenth amendment challenge. The cases differ only with respect to how conclusive such reliance may be. The Fifth Circuit held that a statute that furthers national security but that also raises tenth amendment questions is constitutional if it satisfies a balancing test. In that balancing test, Congress' reliance on its national security power is an important factor tipping the scale toward constitutionality.[48] Going even further, the Seventh Circuit and the Ninth Circuit have indicated that *National League of Cities* is "inapposite" when Congress acts under its power to protect national security and that in such cases a tenth amendment challenge may be rejected without the necessity of undertaking a balancing test.[49]

The present challenge to PURPA must, therefore, fail. We have shown above, at pages 25-27, that title I, section 210, and title III satisfy the balancing test required of statutes that merely regulate commerce. If statutes preserving national security are also subject

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[48] *See* Peel v. Florida Dep't of Transp., 600 F.2d 1070 (5th Cir. 1979).

[49] *See* Cantwell v. County of San Mateo, 631 F.2d 631, 636 (9th Cir. 1980); Jennings v. Illinois Office of Educ., 589 F.2d 935 (7th Cir.), *cert. denied*, 441 U.S. 967 (1979).

to a balancing test, that test is less stringent and the provisions pass it even more easily. Moreover, if the Seventh and Ninth Circuits are correct that no balancing test is required, the challenged provisions' reasonable relation to national security is itself sufficient to establish their compliance with the tenth amendment.

CONCLUSION

The judgment of the United States District Court for the Southern District of Mississippi should be reversed.

Respectfully submitted,

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APPENDIX

DESCRIPTION OF AMICI

Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of *Consumer Reports*, its other publications, and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports*, with over 3 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

National Consumer Law Center, Inc., is a national nonprofit organization that represents the interests of low- and moderate-income consumers. The Center's Energy Project provides legal representation for consumers and consumer groups concerned about community energy self-sufficiency, utility rate setting, and energy pricing in all states in the nation. The Center supported the original enactment of the Public Utility Regulatory Policies Act and continues to represent groups working to implement this act in the fifty states.

National Wildlife Federation is the nation's largest nonprofit citizen's conservation organization, with 4.1 million members and supporters. It was founded in 1936, the result of the first North American Wildlife Conference, called by the President of the United States to stimulate public interest in proper management of wildlife and other natural resources. The conservation policies of NWF are set by local leaders elected as delegates to the Federation's annual convention. These delegates represent affiliate organizations in all fifty states as well as

Guam, Puerto Rico, and the Virgin Islands. They also elect the volunteer officers of the Federation. The organization's chief regular publications are the magazines *National Wildlife, International Wildlife,* and *Ranger Rick*; a monthly newspaper for affiliate leaders; and *Conservation Report.* Each state affiliate also produces its own monthly publication.

Natural Resources Defense Council, Inc., a national environmental organization with more than 44,000 members residing in all states and territories, as well as abroad, has as one of its principal goals the preservation and wise use of the natural resources of the earth, including those resources such as clean air and clean water held in common by all people. NRDC has sought, through the advocacy of effective federal, state, and local laws, to assure that those commonly held resources are protected.

Solar Lobby is a not-for-profit organization with more than 40,000 members across the United States, in the U.S. territories, and in other countries. Solar Lobby's purpose is to take nationally focused political action to achieve the rapid, substantial, and widespread use of solar energy in an energy-efficient, environmentally sound, and equitable society. The staff of the Solar Lobby works nationally and through affiliate groups around the United States to ensure a rapid transition to a society based on renewable energy resources and energy efficiency with an emphasis on decentralized approaches to solving our energy needs. This organization envisions a society that obtains twenty-five percent of its total energy needs from renewable resources by the year 2000. Solar Lobby's national office is located in Washington, D.C. The organization's Media Project is located in Los Angeles, California.